STATE OF MICHIGAN

COURT OF APPEALS

JUDY K. WITT,

Plaintiff-Appellant,

v

LOUIS C. GLAZER, M.D., and VITREO-RETINAL ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED
January 20, 2011

No. 294057
Kent Circuit Court
LC No. 07-013196-NO

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Plaintiff Judy Witt appeals as of right from a circuit court order granting defendants, Louis Glazer, M.D. and Vitreo-Retinal Associates, P.C.'s, motion to strike Witt's expert witness, denying her motion to amend her expert witness list and to adjourn trial, and dismissing the action. On appeal, Witt argues that defendants' motion was untimely, that defendants were estopped from challenging the credentials of Witt's standard of care expert, that defendants were required to first challenge Witt's affidavit of merit, and that the trial court should have permitted Witt to amend her witness list. We affirm.

I. FACTS

This medical malpractice action arises from Dr. Glazer's treatment of Witt's right eye. On August 19, 2006, Witt presented at Sheridan Hospital complaining of loss of vision in her right eye. She was referred to an ophthalmologist at Metropolitan Hospital and went there the same day. She was diagnosed with a "macula-off retinal detachment OD-tractional" and was directed to follow up with Dr. Glazer the following day for evaluation and possible surgery. The next day, Dr. Glazer diagnosed Witt with a "dense vitreous hemorrhage OD of unknown etiology" but did not diagnose her with a retinal detachment. On September 22, 2006, Witt again treated with Dr. Glazer, who at that time diagnosed her with a "dense vitreous hemorrhage OD with new onset of detached retina." Thereafter, Dr. Glazer performed surgery on Witt's right eye.

On December 18, 2007, Witt filed this medical malpractice action against Dr. Glazer and his practice, Vitreo-Retinal Associates, alleging that Dr. Glazer failed to timely diagnose her detached retina. Witt attached to her complaint the amended affidavit of merit of Dr. John M. Williams, Sr., M.D., a board certified ophthalmologist, who stated that he had devoted a majority

of his professional time to the practice of ophthalmology and occupational medicine during the year immediately preceding Dr. Glazer's treatment of Witt.

On December 19, 2008, defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), arguing that Witt's notice of intent to file suit was defective. On the same day, defendants moved for partial summary disposition under MCR 2.116(C)(8) and (10), arguing, in relevant part, that they were entitled to summary disposition on Witt's claims alleging negligence on or after September 11, 2006, because Witt was unable to establish that she would have had a better outcome if surgery had been performed sooner. Defendants relied on Dr. Williams's deposition testimony stating that he was unable to quantify Witt's chances for a better outcome if surgery had been performed on September 12, 2006, or thereafter. Dr. Williams stated that by that date any percentage increase in the chance of a better outcome was speculative.

On February 20, 2009, the trial court denied defendants' motion for summary disposition on the basis of the alleged defective notice of intent. On the same day, the trial court entered an order dismissing by stipulation Witt's claims of negligence on or after September 11, 2006.

The trial court scheduled trial for July 27, 2009. On July 23, 2009, defendants moved to strike Dr. Williams's testimony and dismiss Witt's claims. They argued that Dr. Williams was not qualified to testify regarding the appropriate standard of care under MCL 600.2169(1)(b) because he did not devote a majority of his professional time to the active clinical practice or instruction of ophthalmology during the year immediately preceding Dr. Glazer's treatment of Witt. Defendants relied on Dr. Williams's deposition testimony stating that since July 2003, he had been employed as the medical director of the occupational health service at Aspirus Medical Group. In that capacity in 2005 and 2006, he spent approximately 60 percent of his time performing administrative duties, 15 percent performing expert witness work, and 25 percent treating patients. Dr. Williams further testified that he treated patients at Aspirus Medical Group in his capacity as an occupational physician rather than as an ophthalmologist. Between September 1997 and March 2000, Dr. Williams transitioned his practice from full-time ophthalmology to full-time occupational health. He admitted that he last held himself out as an ophthalmologist in March 2000 and last performed retinal detachment surgery in 1998. Defendants contended that without Dr. Williams's testimony, Witt had no standard of care expert. They also asserted that their motion was timely.

In response, Witt conceded that Dr. Williams did not "technically meet the requirements of MCL 600.2169(1)," but argued that defendants' motion was essentially a motion for summary disposition that was untimely pursuant to the trial court's scheduling order. Witt asserted that defendants had established a pattern of violating the scheduling order because they also untimely filed their expert witness list and their two previous summary disposition motions. Witt further argued that defendants waived the requirements of MCL 600.2169(1) by relying on Dr. Williams's testimony in support of their motion for partial summary disposition. Witt contended that the underlying premise of that motion was that Dr. Williams had the requisite credentials to offer opinion testimony. She argued that she stipulated to the relief requested in the motion based on Dr. Williams's testimony and the assumption that defendants had conceded that Dr. Williams was qualified to render his opinion. Thus, Witt asserted, defendants waived any

argument regarding Dr. Williams's qualifications. Witt further argued that defendants were equitably estopped from asserting the requirements of MCL 600.2169(1) on the same basis.

Along with her response brief, Witt moved for leave to amend her witness list and to adjourn trial if the trial court decided to grant defendants' motion. She argued that, unlike defendants, she had strictly complied with the scheduling order. She further contended that she should be permitted to amend her expert witness list because barring expert testimony would result in a dismissal of her action, a harsh sanction that was not warranted.

In response, defendants argued that Witt had been familiar with Dr. Williams's qualifications for nearly two years and failed to obtain a qualified expert. They argued that Dr. Williams's September 29, 2008 deposition testimony clearly demonstrated that he was not qualified to testify as an expert and that Witt was aware at least by that date that he failed to satisfy the statute. Defendants further contended that the scheduling order required a showing of good cause for an expert witness not identified on a party's expert witness list to testify at trial. Defendants argued that the scheduling order also required that motions for adjournment strictly comply with MCR 2.503 and stated that such motions would rarely be granted.

At a July 27, 2009 hearing, Witt's counsel argued:

> I was aware of the potential issue. No question. My expectation was, it would be addressed by way of a motion for summary disposition. That deadline came and went. They—they chose not to challenge it under (C)(10) or (C)(8).
>
> And so what happened after the motion deadline was—was over? They filed two subsequent motions: One on the alleged defective notice of intent; the other, based upon Dr. Williams' testimony on the issue of lost opportunity.
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> * * *
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> And what makes this case different—what I really need to brief further, quite honestly, Judge, is they relied upon the opinion testimony of Dr. Williams in their motion for partial summary disposition. . . .
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> * * *
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> I think I had reason to believe, hey, they're—they're not challenging Williams. They're relying upon his opinions. They're—underlying all of that, had to be an assumption that Williams is credentialed. He's offering these opinions regarding lost opportunity. And as a result, granted us a motion for partial summary disposition. It was based on that, that I stipulated to the relief requested in that particular motion.

The trial court determined that defendants' motion was not a summary disposition motion and that it was timely filed. The trial court recognized that instead of granting the motion, it could wait until trial and grant defendants a directed verdict on the ground that Dr. Williams was not qualified to offer expert testimony. The trial court further determined that defendants did not waive their challenge to Dr. Williams's qualifications and that it was not defendants'

responsibility to instruct Witt regarding the law. Addressing Witt's motion to file an amended witness list, the trial court ruled:

> [B]ack when that first deposition was taken, back on September 29th, of 2008. That's almost a year ago. For whatever reasons, Mr. Schrotenboer [Witt's counsel], you made the decision to proceed with this expert, based on your testimony today, with the clear basis that he was unqualified by the statute.
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> * * *
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> I do not see any good cause at this point in time, based upon all the arguments, everything that I have read, to say that this case should be adjourned.
>
> Accordingly, I am not going to adjourn this case. I'll enter an order dismissing this action, as [Witt] has no expert and cannot, pursuant to the applicable case law, establish a standard of care.

On August 10, 2009, the trial court entered an order striking Dr. Williams's testimony, denying Witt's motion to adjourn trial and amend her expert witness list, and dismissing Witt's claims. Witt moved for reconsideration, which the trial court denied for failure to "demonstrate a palpable error by which the court has been misled." Witt now appeals.

II. DEFENDANTS' MOTION TO STRIKE WITNESS AND DISMISS CLAIMS

A. STANDARD OF REVIEW

Witt argues that the trial court erred by striking her expert witness's testimony and dismissing her claims. We review for an abuse of discretion a trial court's decision to strike a witness's testimony.[1] We also review for an abuse of discretion a trial court's decision to dismiss an action.[2] "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes."[3]

B. TIMELINESS

In a medical malpractice action, expert testimony is generally required to establish the applicable standard of care and breach of that standard.[4] MCL 600.2169 provides, in relevant part:

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[1] *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001); *Greathouse v Rhodes*, 242 Mich App 221, 227; 618 NW2d 106 (2000), rev'd on other grounds 465 Mich 885 (2001).

[2] *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

[3] *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

[4] *Birmingham v Vance*, 204 Mich App 418, 421; 516 NW2d 95 (1994).

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
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> * * *
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> (b) Subject to subdivision (c),[5] during the year immediately preceding the date of the occurrence that is the basis for the claim or action, *devoted a majority of his or her professional time* to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.[6]

In *Kiefer v Markley*,[7] this Court determined that the phrase "devoted a majority of his or her professional time," requires that an expert "spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice."

Here, it is undisputed that Witt's expert, Dr. Williams, was not qualified to offer expert testimony because he did not spend more than 50 percent of his professional time practicing or teaching in the field of ophthalmology during the year immediately preceding Dr. Glazer's treatment of Witt. Witt argues that defendants' motion to dismiss was, in effect, a motion for summary disposition under MCR 2.116 that was untimely filed and should not have been considered. But, pursuant to *Greathouse v Rhodes*,[8] Witt's argument lacks merit.

In *Greathouse*, the plaintiff moved to strike the defendant's expert testimony less than one month before trial on the basis that the experts were not qualified to offer opinion testimony regarding the appropriate standard of care.[9] The trial court initially granted the plaintiff's motion but thereafter determined that MCL 600.2169 was unconstitutional and admitted the testimony.[10]

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[5] It is undisputed that subdivision (c) is not applicable.

[6] Emphasis added.

[7] *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009).

[8] *Greathouse v Rhodes*, 465 Mich 885; 636 NW2d 138 (2001).

[9] *Greathouse*, 242 Mich App at 224.

[10] *Id.* at 226.

On appeal, this Court noted that after the trial court's ruling, the Michigan Supreme Court determined in a different action that MCL 600.2169 was not unconstitutional.[11] This Court nevertheless concluded that the trial court properly allowed the testimony because the plaintiff forfeited her ability to challenge it by failing to timely invoke MCL 600.2169.[12] This Court held that a party's failure to challenge an expert's qualifications under the statute within a reasonable time results in forfeiture of the challenge.[13] In lieu of granting leave to appeal, the Supreme Court summarily reversed that portion of this Court's decision, stating "[t]here is no statutory or case law basis for ruling that a medical malpractice expert must be challenged within a 'reasonable time.'"[14]

Witt erroneously argues that defendants' motion was in essence a motion for summary disposition. Rather, defendants moved to strike Dr. Williams's testimony and dismiss the action as a result of Witt's failure to proffer admissible expert testimony regarding the standard of care. As in *Greathouse*, the motion was timely.

Witt contends that this case is distinguishable from *Greathouse* because defendants previously relied on Dr. Williams's testimony in their motion for partial summary disposition. However, defendants' mere reliance on Dr. Williams's testimony in support of their argument regarding Witt's loss of opportunity claim did not waive their objection to Dr. Williams's qualifications. Although Witt contends that she stipulated to the dismissal of her loss of opportunity claim on the assumption that defendants had conceded Dr. Williams's qualifications, nothing in the record, the stipulation, or the order to dismiss supports her argument. If defendants' concession regarding Dr. Williams's credentials was a condition of the stipulation, then that should have been made part of the record.

C. ESTOPPEL

Witt also contends that defendants were equitably estopped from asserting the requirements of MCL 600.2169. "Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts."[15] Witt argues that defendants induced her to believe that they did not intend to challenge Dr. Williams's credentials and that she justifiably relied on her belief. As previously discussed, defendants' actions did not indicate that they conceded Dr. Williams's qualifications to offer standard of care testimony. Further, any reliance on defendants' actions as indicating such a concession was not justifiable in

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[11] *Id*. at 228, citing *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999).

[12] *Id.*

[13] *Id.* at 231.

[14] *Greathouse*, 465 Mich at 885.

[15] *AFSCME Int'l Union v Bank One*, 267 Mich App 281, 293; 705 NW2d 355 (2005) (quotations and citations omitted).

light of the fact that Witt's counsel was aware that Dr. Williams was not qualified under MCL 600.2169.

D. CHALLENGE TO AFFIDAVIT OF MERIT

Witt argues that defendants were required to challenge Dr. Williams's affidavit of merit if they opposed his qualifications to offer standard of care testimony. Witt relies on *Kirkaldy v Rim*,[16] in which our Supreme Court stated that "if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit." Witt's reliance on *Kirkaldy* is misplaced because that case involved a challenge to the plaintiff's affidavit of merit and its effect on the tolling of the limitations period. That situation is not presented in this case. In any event, MCL 600.2912d(1) requires a plaintiff "to file with the complaint an affidavit of merit signed by an expert who the plaintiff's attorney *reasonably believes* meets the requirements of MCL 600.2169."[17] That standard is different from the trial standard that precludes an expert's testimony unless the expert meets the criteria listed in MCL 600.2169(1).[18] In *Grossman*, the Supreme Court opined that the rationale for the differing standards stems from the fact that no discovery is available until a civil action has been commenced and discovery assists a plaintiff's attorney to better ascertain a physician's qualifications.[19] Thus, the standards for challenging an affidavit of merit and seeking to exclude expert testimony during trial are different and nothing requires that a defendant first challenge the affidavit of merit in order to seek the exclusion of trial testimony.

III. WITT'S MOTION TO AMEND WITNESS LIST AND ADJOURN TRIAL

A. STANDARD OF REVIEW

Witt argues that the trial court erred by denying her motion to amend her expert witness list and to adjourn trial. We review these issues for an abuse of discretion.[20]

B. ANALYSIS

Witt argues that the trial court abused its discretion by failing to consider the factors articulated in *Dean v Tucker*,[21] such as whether the violation was wilful or accidental, and whether the plaintiff's history indicates a pattern of deliberate delay. Witt's reliance on *Dean* is misplaced, however, because that case involves discovery sanctions rather than the failure to

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[16] *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007).

[17] *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004) (emphasis in original).

[18] *Id.* at 599.

[19] *Id.*

[20] *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991).

[21] *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

produce a witness qualified to testify under MCL 600.2169.[22] Thus, the factors articulated in *Dean* are inapplicable.

The trial court's scheduling order required that Witt disclose all expert witnesses by April 25, 2008, and stated, "*Absent a showing of good cause, expert witnesses not identified as required hereby will not be allowed to testify at trial.*" The scheduling order also provided that motions for adjournment of trial must strictly comply with MCR 2.503(B) and (C)(1), and would rarely be granted. MCR 2.503(B)(1) requires that motions for adjournment be based on good cause,[23] and MCR 2.503(C)(1) provides that motions to adjourn a proceeding based on the unavailability of a witness must be made as soon as possible.[24] Thus, the question is whether Witt's motion to amend her expert witness list and adjourn trial was based on good cause.

The trial court did not abuse its discretion by determining that Witt failed to establish good cause to adjourn trial and to amend her expert witness list. Witt's counsel conceded in the trial court, as he does in this Court, that he was aware that Dr. Williams was not qualified to offer expert testimony. Counsel was aware of this fact at least by the time of Dr. Williams's September 29, 2008 deposition. Yet counsel chose not to obtain a witness who was qualified to offer relevant and necessary standard of care testimony. Although Witt argues that she relied on defendants' actions indicating that they did not intend to challenge Dr. Williams's qualifications, her reliance on such actions, to the extent that it existed, was not reasonable considering the requirements of MCL 600.2169.

Witt further contends that, while she complied with all scheduling order deadlines, defendants were permitted to file untimely motions for summary disposition and an untimely witness list. The record shows that Witt stipulated to the relief requested in one motion, the trial court denied the other motion, and the trial court granted defendants' motion to allow the belated filing of their witness list. Those motions did not seek to adjourn trial on the day of trial for reasons known many months before trial. Accordingly, Witt's argument is unpersuasive.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder

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[22] *Id.* at 31-33.

[23] MCR 2.503(B)(1) states: "Unless the court allows otherwise, a request for an adjournment must be by motion or stipulation made in writing or orally in open court and is based on good cause."

[24] MCR 2.503(C)(1) states: "A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts."